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Federal Communications Commission
Office of Secretary

Con Edison
Law Department
Consolidated Edison Company of New York, Inc.
4 Irving Place, New York, N.Y. 10003

September 30, 1996

Office of the Secretary
Federal Communications Commission
1919 M. Street, N.W., Room 222
Washington, D.C. 20554

CC 95-185

Re: Request for Reconsideration and Rehearing
of First Report and Order by
Consolidated Edison Company of New York, Inc

To Whom It May Concern:

Please find enclosed for filing in the above proceeding the original and 12 copies of the Rehearing Request of Consolidated Edison Company of New York, Inc., in Case 96-98.

Also enclosed is a copy of the foregoing document and a self-addressed stamped envelope. Kindly date stamp this copy and return it to me in the enveloped provided. Thank you for your cooperation.

Very truly yours,

Mary L. Krayeske

Mary L. Krayeske

Enc.

116581

Before the
Federal Communications Commission

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

Request for Reconsideration and Rehearing
of First Report and Order by
Consolidated Edison Company of New York, Inc.

John D.McMahon
Mary L. Krayeske

Attorneys for Consolidated Edison
Company of New York, Inc.
4 Irving Place - Room 1815-S
New York, N.Y. 10003
Telephone: (212) 460-6330

Dated: September 30, 1996

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Before the
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In the Matter of	)	
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Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions in the	)	
Telecommunications Act of 1996	)	
	)	
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Exchange Carriers and Commercial	)	CC Docket No. 95-185
Mobile Radio Service Providers	)	

Request for Reconsideration and Rehearing
of First Report and Order by
Consolidated Edison Company of New York, Inc.

Under the Telecommunications Act of 1996 (the "Telecommunications Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996), the Federal Communications Commission ("Commission") was required to promulgate and implement rules under the Telecommunications Act by August 8, 1996. The promulgation of these rules was intended to aid in the deregulation process. One area of particular concern in the Telecommunications Act was the interconnections between competing carriers. An important issue within this interconnection area is that of pole attachments.* On August 8, 1996, after requesting and receiving comments from interested parties in rulemaking proceedings, the Commission released its First Report

* The Telecommunications Act required that utilities provide "a cable television system or any telecommunications provider with nondiscriminatory access to any pole, duct, conduit and right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). However, the law limited the access rights in certain situations. A utility may "deny access to its poles, ducts, conduits, or rights-of-way on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. §224(f)(2).

and Order ("Report and Order") regarding the referenced rulemakings. The Report and Order promulgated interconnection rules, including rules dealing with pole attachments.

Consolidated Edison Company of New York, Inc. ("Con Edison" or "the Company") requests reconsideration and rehearing of the Report and Order. Con Edison believes that the Report and Order imposes requirements on electric utilities, especially electric utilities like Con Edison with expensive and difficult-to-maintain and install underground systems, that go beyond Congress' intent and that unreasonably and arbitrarily disregard the interests of electric utility consumers and investors.

Specifically, Con Edison requests rehearing with respect to the following:

- the requirement that electric utilities be required to expand facilities in order to provide access to telecommunications companies;
- the requirement that "extra space" available to telecommunications carriers include space that electric utilities plan to use in the future (to accommodate growth, for example) but not for a "specific purpose;"
- the requirement that electric utilities use their power of eminent domain in order to acquire property needed to provide access;
- the requirement that utilities allow other supposedly qualified workers to do the work needed to provide access;
- the requirement that electric utilities provide two-months notice that its facilities are to be modified;

- the disregard of the electric utility interest in protecting the security of its system;
- the requirement that utilities using wires for internal communications be subject to the same duties as telecommunications carriers;
- the evident requirement that the access requirements extend to all electric utility transmission towers; and
- the failure to limit the equipment to be granted access to cables.

1. Utilities Should Not Be Mandated To Expand Existing Capacity Solely For The Benefit Of Attaching Parties.

The Report and Order requires that utilities "take all reasonable steps to accommodate [pole attachment] requests" (¶ 1163). A utility must take these "reasonable" steps even in situations where the utility does not have sufficient capacity to handle the requested attachment. For example, the Commission suggests that a utility should increase its pole size from 40 to 45 feet or build larger conduit spaces in order to accommodate the attaching entity. These accommodations would be made solely for the availability of attaching entities needs, not for utilities' own needs. The Report and Order expects that before a utility can deny access based on insufficient capacity, the "utility must explore potential accommodations in good faith with the party seeking access" (¶1163), and states that attaching entities are not required to "exhaust any possibility of leasing capacity from other providers" (¶1164). This goes well beyond the authority the Commission was granted under the Telecommunications Act.

The concept of nondiscriminatory access, at most, would require electric utilities to provide access to space that is available for that purpose. In Michigan Comm'n v. Duke, 266 U.S. 570, 577 (1925), the court described the duty of motor carriers as the requirement to "serve all, up to the capacity of his facilities."

There is no basis for imposing on electric utilities the duty to expand their system to accommodate telecommunications carriers. The Commission uses the nondiscriminatory access concept to assume that Congress decided to make electric utilities the "builder of last resort" for the nations's telecommunications industry.

It is insufficient to say that because electric utilities are allowed to deny access for "technical" and similar reasons that the requirement is a rational one.

Utilities are not in the conduit or pole business. Requirements that they perform construction jobs for the telecommunications industry means that (1) electric utilities will be seen by the public as digging up the streets to expand electric utility conduit "again"; (2) electric utilities will have to divert their management and supervisory resources to performing projects for the telecommunications industry; and (3) electric utilities will be required to put the regularity of supply to their consumers at risk while they perform unnecessary electric re-wiring work on their facilities.

Since most things are "possible," there may be no "technical" reason that a particular job of expanding a conduit cannot be done. But that does not mean that the electric utility should be conscripted to perform that work, putting its operations and reliability into jeopardy.

2. Utilities Should Not Be Required To Allow Attaching Entities Into Its Reserve Space.

The rules state that all unused space on utility poles and conduits other than space held for a "specific" purpose must be made available for telecommunications carriers (¶ 1165-1170). Con Edison's system has very little extra space reserved for a "specific" purpose unless the term "specific" purpose includes the specific purpose of providing for space for facilities needed to accommodate projected growth in demand.

If the term "specific" does not include room for a utility's projected growth, then the rule does not reflect the reality of operating a modern electric utility. Con Edison typically builds into its conduits room for anticipated growth. The investment in its conduits reflects the costs of building-in growth, and utilities charge their customers for the larger-sized facility. If a telecommunications carrier uses this extra space, it will accelerate electric utility construction and increase the bills of electric ratepayers because the electric ratepayers will be charged the higher cost of the newly-constructed plant when it is built.

Utilities should not be mandated to allow attaching entities to use reserve space while the utility is not using the space. Reserve space serves a specific purpose.

3. Utilities Should Not Be Expected To Use Its Eminent Domain Authority For Attaching Entities.

In the Report and Order, the Commission announced that "a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over

private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments" (¶1181).

The Commission should eliminate this rule. First, in New York, as is probably the case in many other jurisdictions, this rule extends beyond the boundaries of an electric and gas utility's condemnation powers. Pertinent New York law permits an electric and gas corporation the "power and authority to acquire such real estate as may be necessary for its corporate purpose and the right-of-way through any property" NY Transportation Corporations Law § 11 (emphasis supplied). Con Edison only has the power and authority to condemn for its own corporate purposes. The use of this property for telecommunications entities would not fall within Con Edison's corporate purposes. Therefore, any attempt by Con Edison to use its eminent domain powers on behalf of another entity would violate New York law.

Second, the Commission is overreaching and potentially overstepping its jurisdiction with this rule. Utilities cannot be mandated to use their eminent domain power for other entities. Telecommunications providers, not utilities, are the proper entities that should be exercising the eminent domain power to gain access to these facilities if they desire access. This attempt to piggy-back telecommunications providers' usage of condemnation and eminent domain powers of a utility is overreaching and intrusive. There is no mention of eminent domain powers in either the law or the corresponding conference report. This interpretation is totally inappropriate.

4. Only Individuals Employed Or Designated By Utilities Should Be Permitted In The Proximity of Utility Facilities.

One issue raised in comments was that of the proper personnel to be authorized to work around utility facilities. In the Report and Order, the Commission addressed this matter. It was stated that "we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility" (¶1182). Although the Commission would permit the utilities to require that "individuals who will work in the proximity of electric lines have the same qualifications in terms of training, as the utility's own workers," but the "party seeking access will be able to use any individual workers who meet these criteria" (¶1182). The Commission justified this requirement by maintaining that any mandate for workers would impede access and/or lead to disputes over payment rates for the workers.

Con Edison's training and experience requirements are very rigorous, and they are tailored to the design of its system. Indeed, in some areas, they exceed government-mandated requirements. These rules have been implemented for both the safety of the equipment and personnel as well as the reliability of the system. The infrastructure of Con Edison's system is more complex than any other utility system. This is due to the Company's infrastructure and redundancy designs. These designs have been built to accommodate the particular locational factors of New York City as well as the higher level of reliability necessary to serve the Company's customers. Outside personnel unfamiliar with this system could unintentionally damage or destroy a highly valuable system that Con

Edison has worked very hard to maintain. Thus, an outside seasoned expert would not be "qualified" to work on Con Edison's system because the worker would not have satisfied Con Edison's requirements for experience gained through actual "hands on" experience on the system, under the supervision of individuals who have substantial familiarity with the Company's unique system.*

Nor does the Commission's rule appear to respect labor contracts and labor laws. For example, the rule could be read to require the Company, in effect, to contract out work on its facilities. Such a rule arguably implicates Con Edison's collective-bargaining agreements with its unions, which contain various provisions applicable to contracting out work, and which also contain grievance/arbitration procedures for resolving disputes over contract issues. Such terms should not simply be ignored.

As to the asserted justification for the rule, rates of pay for utility workers should be a negotiated portion of the pole access agreement and, consequently, access would not be impeded if the costs are defined within the contract or agreement. Thus, this rule should be eliminated and utilities permitted to mandate that only their employees allowed to work on sensitive equipment.

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* Con Edison would, at a minimum, require an indemnity provision for liability in the event that a provider was to use its own contractor. This would include certain financial and insurance requirements. This should not be considered impeding access.

5. Notice Regarding Modification To Pole Attachments Should Be Given Within A One To Two-Week Period Before Any Modification, Not Two Months.

The Report and Order requires that if a written agreement establishing a notice period for parties does not exist, then "written notification of a modification must be provided to parties . . . at least 60 days prior to the commencement of the physical modification itself" (¶1209). The Report and Order justifies the notice period in by "not[ing] that 60 days have been advocated by several parties" (¶1207). In addition, any "[n]otice should be sufficiently specific to apprise the receipt of the nature and scope of the planned modification." (¶1209). The Commission does, however, permit notice of modification "as soon as reasonably practicable" in an emergency situation. Finally, the Commission "encourages" parties to negotiate acceptable notification terms (¶1209). Allowing a one- to two-week period provides an ample notification period for any attaching entity. Scheduling changes, manpower shortages, and budget constraints make a 60-day notice period burdensome. This is another attempt to micro-manage the relationship between two contracting parties. The rules regarding notification should be eliminated as the parties should be able to work out these details on a case-by-case basis.

6. The Burden Of Justifying The Denial Of Access Should Be Placed On The Requesting Entity, Not The Denying Utility.

There are several problems with the dispute resolution requirements that the Commission has promulgated. Utilities should not be immediately mandated to provide copies of maps, plats and other relevant data.

Con Edison and its customers have a strong interest in the security of its system, an interest that should not be pushed aside in a rush to implement rules. There must be a way to accommodate legitimate interests in avoiding sabotage and terrorism while implementing rules. The Commission has a duty to accommodate all those interests, and not ignore the legitimate interest of electric consumers.

7. The Commission Inappropriately And Incorrectly Interpreted The Definitional Section Of The Telecommunications Act.

The Telecommunications Act defines the term utility as "any person who is a local exchange carrier of an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or right-of-ways used, in whole or in part, for wire communications." 47 U.S.C. § 224(a). The Report and Order then interprets the phrase by determining that the term wire communication is "broad and clearly encompasses an electric utility's internal communications" (¶1174). Thus, if a utility has an internal communications system used solely for its own purposes, any of the Company's facilities would be subject to the Pole Attachment provisions of the Telecommunications Act.

These rules incorrectly interpret the intent of the Telecommunications Act by broadly expanding access requirements. The Commission's interpretation of the definition of wire communications expands the law in an area where the law clearly does not require expansion, burdening electric utilities.

8. The Telecommunications Act Only Mandated Access To Poles, Ducts, Conduits and Rights-of-Way.

The Telecommunications Act very specifically stated that telecommunications providers would have access to poles, ducts, conduits, and rights-of-way. There was no mention of transmission towers, pathways, generating stations, buildings or any other category of facility of a utility. The Report and Order seems to require access to greater number of facilities than those four advocated under the law. Regarding transmission towers, the Report and Order states "[w]e believe that the breadth of the language contained in section 224(f)(1) precludes us from making a blanket determination that Congress did not intend to include transmission facilities" (¶1184). Four facilities are covered by the legislation – poles, ducts, conduits, and rights-of-way. Transmission towers are not covered by the law. The Telecommunications Act did not allow access to a utility's generation station, transmission facilities or utility meters. The attachment obligation imposed on utilities are significant and should not be expanded into areas not addressed by Congress.

9. The Only Type Of Facility To Be Attached Should Be Cables.

Neither the Telecommunications Act nor the Report and Order discuss the equipment that can be attached. The Report and Order states that we "do not believe that establishing an exhaustive list of such equipment is advisable or even possible. We presume that the size, weight, and other characteristics of attaching equipment have an impact on the utility's assessment of the factors determined by the statute to be pertinent -- capacity,

safety, reliability, and engineering principles. The question of access should be decided based on those factors." (¶1186).

In this case, the Commission misunderstands the intent of the law. The only equipment permitted to be attached to utility facilities are cables. The intent of the law was to allow entities to attach along distribution networks, and consequently the only facilities that could possibly be contemplated to attach along these distribution networks would be cables. Certainly, equipment that does not need a right-of-way should be excluded. The Commission is again attempting to improperly expand the requirements of the Telecommunications Act.

CONCLUSION

For the reasons set forth herein, the Commission should allow rehearing and reconsider the Report and Order and adopt rules consistent with Con Edison's position.

Respectfully Submitted,

Consolidated Edison Company
of New York, Inc.
4 Irving Place - Room 1815-S
New York, New York 10003
(212) 460-6330

By: John D. McMahon
Mary L. Krayeske

Dated: September 30, 1996